**IN THE HIGH COURT OF BOMBAY AT GOA**

**CRIMINAL APPEAL NO. 7 OF 2004**

State ... Appellant

versus

Vazir Hakki,
Resident of House No.660,
Indiranagar, Chimbel,
Native of Savnur,
Village District, Dharwad,
Karnataka. ... Respondent

Ms. Winnie Coutinho, Additional Public Prosecutor for the Appellant/State.

Mr. Menino Teles, Advocate for the Respondent.

**CORAM: A. P. LAVANDE &**
**N. A. BRITTO, JJ.**

**DATE : 1ST FEBRUARY, 2005.**

**ORAL JUDGMENT(PER N. A. BRITTO, J.)**

This is a State's appeal against acquittal of the

accused under Section 302 I.P.C. by Judgment/Order dated 30-6-2003 of the learned Ist Additional Sessions Judge, Panaji, in Sessions Case No.18 of 2001.

2. There is no dispute that the accused and the deceased Nacima Banu got married, both for the second time, on 18-2-2001 and the deceased Nacima Banu suffered burn injuries to the extent of 75 to 77% on 7-3-2001 at about 6 a.m. She was taken to the Goa Medical College, admittedly on a rickshaw being arranged by Allauddin, the brother of the accused and was accompanied by their respective mothers-in-law. As stated by P.W.7/Dr. Silvano Dias Sapeco, Nacima Banu expired on 13-3-2001 at about 2.25 p.m. due to Septicaemia consequent to the infected body surface area flame burns which were fatal in the ordinary course of nature. Although, the diagrammetical depiction of the burn injuries of the deceased Nacima Banu shows that the said injuries were predominantly on the front portion of the body no opinion was elicited from P.W.7/Dr. Sapeco to find out whether the said burn injuries could be homicidal, as contended by the prosecution, or accidental, as contended on behalf of the accused.

3. The case of the prosecution was that it is the accused who committed the murder of his wife Nacima Banu by intentionally causing her death by pouring kerosene on her body and setting fire by lighting a match stick.

4. On the other hand, it was the case of the accused that on the date of the incident the accused was fast asleep when he heard the shouts and cries and when he came out in the kitchen he saw that his mother was extinguishing the fire which was on the clothes of his wife and he too tried to extinguish the same and both of them extinguished the fire. The accused stated that he and his mother sustained injuries and when he shouted for help few people came and asked his wife as to who put fire to her and his wife answered that as she was preparing tea she did not know how she caught the fire. He stated that the parents of his wife came there and people questioned his wife in front of the parents as to who put the fire and she answered that neither her husband nor his mother put the fire but she caught fire while she was preparing tea. The case of the accused was that he was falsely implicated.

5. The case of the prosecution was based on multiple

dying declarations having been made by the accused. One oral dying declaration claiming the same to be first in point of time, made by the deceased Nacima Banu was sought to be proved by the prosecution through the evidence of P.W.1/Imam Hussain, P.W.2/Basha Sab and P.W.4/Hazarat Bi who are the uncle, father and grandmother respectively of the deceased Nacima Banu. The prosecution also produced a written dying declaration recorded by P.W.5/Vinayak Shankar Alornekar, the Special Judicial Magistrate, in the presence of P.W.14/Dr. Nilesh Talwadkar. On the other hand, the accused also sought to prove an oral dying declaration claiming to be the first made by the deceased, through the evidence of three neighbours, namely, D.W.1/Fatima Bi Shaikh, D.W.2/Shahnawaz Bukhari and D.W.3/Kassim Mulla, who according to the learned Additional Sessions Judge were totally independent and respectable members of the Community of the accused and the deceased. The learned Additional Sessions Judge found several discrepancies in the dying declaration as made to the said uncle, father and grandmother of the deceased vis a vis the written dying declaration of the deceased recorded by P.W.5/Shri Alornekar and held that the dying declaration made to the said uncle, father and grandmother as well as the written dying

declaration were unreliable.

6. In an appeal against acquittal, we are required to see whether the view taken by the learned Additional Sessions Judge is plausible and in fact, we find that from the evidence produced by the prosecution and the defence the view held by the Additional Sessions Judge was a probable view. It is now well settled with a catena of decisions of the Supreme Court that in an appeal against acquittal certain cardinal rules are required to be kept in mind, namely, (a) that there is a presumption of innocence in favour of the accused which has been strengthened by the acquittal of the accused by the trial Court, (b) if two views are possible, a view favourable to the accused should be taken, (c) that the trial Judge had the advantage of looking at the demeanour of the witnesses and (d) the accused is entitled to a reasonable benefit of doubt, a doubt which a thinking man will reasonably, honestly and consciously entertain.

7. Before reference is made to the evidence produced by the prosecution and the defence, reference is required to be made to certain suspicious features which throw doubt on the bonafides of investigations and consequently which throw doubt

on the case of the prosecution being established beyond reasonable doubt and which are otherwise not specifically dealt with by the learned Additional Sessions Judge.

8. The first is regarding the F.I.R. which came to be recorded from the father of the deceased, namely, P.W.2/Basha Sab. According to him this F.I.R. was recorded at 12 noon on 8-3-2001 but as per P.W.15/P.I. Vincy Paes it was recorded at about 00.30 hours on 7-3-2001. No record has been produced to justify the last statement. According to P.W.15/Shri Paes, he went to the Goa Medical College at about 9.00 hours on the same day when the deceased told him that her husband had poured kerosene on her and set her on fire with a lighted match stick. In cross-examination, he admitted that the said information given by the deceased was regarding cognizable offence and such information was required to be taken down in writing under Section 154 Cr.P.C., but, did not provide any explanation as to why he did not record the said information given by the deceased in writing. Admittedly, both the mothers-in-law had gone to the Goa Medical College along with the deceased and the exact information as to what happened to the deceased at the relevant time would have been available with

them or other relations of the accused/deceased, but P.W.15/Shri Paes did not record any first information report either from the deceased or from any of their relatives. P.W.15/Shri Paes has stated that the letter Exh.19 dated 7-3-2001 was written by him to the Special Judicial Magistrate and signed by P.W.16/P. I. Prabhudessai and was sent at 2 p.m. on 7-3-2001. In case the deceased had told P.W.15/ Shri Paes that her husband had poured kerosene on her such an information would have been at least found written in Exh.19 by which the Special Judicial Magistrate was requested to record the dying declaration of the deceased. When P.W.15/Shri Paes was asked as to why he did not record the statement made by the deceased to him that her husband had poured kerosene on her, P.W.15/Shri Paes stated that at that time, she was not in a condition to make a statement, and, therefore, he had requested the Special Judicial Magistrate to record her dying declaration. It is obvious that P.W.15/Shri Paes has not deposed correctly as to what exactly he learnt on making enquiries soon after he went to Goa Medical College at about 9.00 hours on 7-3-2001. P.W.2/ Basha Sab, the father of the deceased has clearly stated that on 7-3-2001 when he had gone to the hospital at Bambolim, he had met the Police many times including during the night time and

had discussions with him. If that is the case, there has been no explanation from either P.W.2/ Basha Sab or for that matter P.W.15/Shri Paes as to why the recording of F.I.R. was at all delayed. It is well settled proposition that undue or unreasonable delay in lodging a F.I.R. inevitably gives rise to suspicion and this puts the Court on guard for possible motive in implicating the accused. Although, no duration of time in the abstract can be fixed as reasonable time for filing a F.I.R., in this case the delay appears to be quite fatal to the case of the prosecution in the light of what has been stated hereinabove. As stated by the Supreme Court in the case of **State of Rajasthan** v. **Maharaj Singh and another** (2004(6) Supreme 476) the delay in lodging the F.I.R. is material when there is a doubt regarding the prosecution case. The delay in this case had also to be seen in the light of the defence evidence produced on behalf of the accused. The delay probably explains that at the time when P.W.15/ Shri Paes visited the deceased on the same day at about 9 a.m. there was no particular story to be presented as to how the deceased had sustained the said burn injuries and the said story was probably made up only on the next day when the F.I.R. came to be recorded as per P.W.2/Basha Sab. The fact that the statements of the other prosecution witnesses, namely, P.W.1/

Imam Hussain and P.W.4/Hazarat Bi came to be recorded just prior to the death of the deceased on 12-3-2001 and without any explanation, would also support such a conclusion. P.W.1/Imam, who is the uncle of deceased also chose not to lodge any complaint, though he claims that the deceased told him that the accused had put fire to her.

9. The next aspect is regarding the scene of offence panchanama. If P.W.15/Shri Paes knew at 9.00 hours on 7-3-2001 that the case of Nacima Banu was one of homicide, the next immediate step expected of him was to come to the scene of offence and prepare a scene of offence panchanama or direct some other Officer to do so. According to P.W.15/Shri Paes the scene of offence panchanama was conducted on 8-3-2001 between 8.30 to 9.30 hours. P.W.9/Nazir Ahmad and P.W.10/ Babajan Nelgi, who were examined by the prosecution to prove the said panchanama have failed the prosecution miserably. According to P.W.9/ Nazir Ahmad, he did not know anything about the panchanama and had put his signature on a plain paper. According to P.W.10/Babajan Nelgi, he was not shown anything and he put a thumb impression on the panchanama which was shown to him. If P.W.15/Shri Paes chose

not to record a prompt F.I.R. which otherwise he could have recorded as per facts stated by him or by P.W.2/Basha Sab, we see no particular reason to believe that P.W.15/Shri Paes had recorded the panchanama on the next day as stated by him or for that matter that he had seized any of the articles which were subsequently forwarded to the Central Forensic Science Laboratory. The report of the Central Forensic Science Laboratory therefore would be of no use to the case of the prosecution at all. It is a practice in all cases of serious nature and even otherwise for the Police to prepare a sketch of the scene of offence. None was prepared in this case. This would have certainly helped the trial Court or for that matter this Court to appreciate the evidence of the prosecution witnesses. The sketch, if prepared, would have shown the places where the deceased was set on fire, the place where the accused allegedly stood at the door, the places where other members of the family of the accused were sleeping, etc. and this again would show whether the versions given either by the prosecution or the defence were more probable and, therefore, acceptable.

10. The law on the subject of dying declarations has again been reiterated by the Supreme Court in the case of **Laxman** v.

**State of Maharashtra**((2002) 6 SCC 710). Answering the reference made on a limited point, the Supreme Court speaking through five learned Judges stated that:

> "The situation in which a man is on the deathbed is very solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no

certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise". (Emphasis supplied)

11. As seen from above and even otherwise, there is no prescribed mode, method or form in recording a dying declaration nor is it necessary that invariably the dying declaration should be recorded in the language of the declarant. If that was to be the law then even evidence which is recorded and in all cases in english language could not be relied upon because in most cases it is recorded in a language not spoken to by the witnesses. As far as this case is concerned, the learned Additional Sessions Judge appears to have placed undue importance in rejecting the written dying declaration because the same was not in the language spoken to by the declarant, namely, hindi. Likewise, the learned Additional Sessions Judge gave undue importance to slight variations in the evidence of P.W.5/ Alornekar and P.W.14/Dr. Talwadkar who had certified the fitness of the state of mind of the declarant/deceased. It is to be noted that minor discrepancies assume significance not in the evidence of independent witnesses but only in the evidence of interested witnesses. However, it was not expected of P.W.14/Dr.Talwadkar to have repeated what P.W.5/ Alornekar had done or not done whilst recording the said dying declaration as his role was limited to the extent of certifying whether at the time the declaration was being recorded the deceased was in a

fit state of mind. The dying declaration was presumed to have been voluntarily made unless it was shown that it was a result of pressure or tutoring from the relatives of the deceased and it was particularly not expected on the part of the Special Judicial Magistrate to record that it was made voluntarily. However, in our view, the said written dying declaration was rightly found to be not in conformity either with the oral dying declaration made to the relatives of the deceased in all material particulars nor to the oral dying declaration made to the neighbours of the accused and the deceased who were examined by the defence.

12. The Supreme Court in the case of **Smt. Kamla** v. **State of Punjab** (1993 Cri. Law Journal 68) has stated that when there are more than one dying declaration, they should be consistent particularly in material particulars. In the case of **P. V. Radhakrishna** v. **State of Karnataka**((2003) 6 SCC 443) the Supreme Court has stated that it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated and that the rule requiring corroboration is merely a rule of prudence and once the court is satisfied that the declaration is true and voluntary, a conviction without further corroboration can be

based on the dying declaration. However, the facts of the case show that the written dying declaration of the deceased-Exh.18 colly which was recorded at about 3 p.m. on 7-3-2001 was neither in conformity with the oral dying declaration as deposed to by the close relatives of the deceased nor to the oral dying declaration as deposed to by the neighbours of the accused and the deceased.

13. The deceased in her written dying declaration-Exh.18 colly stated that some persons came from the neighbourhood on hearing her shouts. However, none of such neighbours were examined by the prosecution and when P.W.15/Shri Paes was cross-examined he stated that there were houses in the locality and the house of the accused was in thickly populated locality surrounded on all sides by neighbouring houses and further stated that although he recorded the statements of the inmates of the neighbouring houses, they did not state anything relevant and, therefore, he did not include their statements. However, the defence was able to produce three of such neighbours, namely D.W.1/Fatima Shaikh who was an ex-Sarpanch, D.W.2/Shahnawaz Bukhari who was the President of the Muslim Community and D.W.3/Kassim Mulla who was the Secretary of

their Masjid. The learned Additional Sessions Judge has believed the testimony of these witnesses and in our view, rightly. The learned Additional Sessions Judge observed that the said three defence witnesses were not only the neighbours but also responsible persons of the Community of the accused and the deceased. All the said three witnesses had stated in categorical and unequivocal terms that when they questioned the deceased, the deceased had told them that she did not know how she caught the fire in the kitchen and it suddenly happened. Admittedly, the close relatives of the deceased were residing at a distance of about 50 to 60 meters away from the house of the accused and it is certainly more probable that it is the defence witnesses who being close neighbours reached the scene prior to the said close relatives. P.W.1/Imam has admitted about their presence at the time he went and not only that he has further stated that D.W.1/Fatima Bi was inside the house. P.W.1/Imam further admitted that whenever there is a quarrel or any untoward incident they call the said President of their Masjid and also the Secretary. In our opinion, therefore, the learned Additional Sessions Judge was certainly justified in giving more weight to the testimony of the said three defence witnesses than the three close relatives of the deceased.

14. The deceased in her written dying declaration stated that when her uncles came to her rescue at her residence, he informed her uncles that her husband had set her on fire. Amongst the said uncles who have been examined by the prosecution is only P.W.1/Imam. The said statement of the deceased rules out the possibility that her father P.W.2/Basha Sab and her grandmother P.W.4/Hazarat Bi had reached in time. In fact, the evidence of P.W.2/Basha Sab gives a clear indication that he had not met the deceased until 12 noon when he went to the hospital and his statement that in his presence the deceased had told them at the house of the accused that she was preparing food in the morning time has got to be considered as a clear improvement. In fact, in further cross-examination, P.W.2/Basha Sab stated that he was not in a position to say when his daughter Nacima Banu told him that the accused came and put the fire with a match box. That apart, the learned Additional Sessions Judge has rightly come to the conclusion that the evidence of P.W.1/Imam, P.W.2/Basha Sab and P.W.4, Hazarat Bi was full of omissions and contradictions and otherwise inconsistent with one another.

15. The deceased in her written dying declaration stated that on seeing the people, her husband started extinguishing the fire. The accused also stated that he and his mother tried to extinguish the fire. P.W.8/Dr. Rodrigues stated that the accused had singeing of hair on the lower arm and both forearms, singeing of hair on the left thigh and three irregular blebs with fluid on the left knee which were caused with dry heat. This shows that the accused did try to extinguish the fire. However, P.W.1/Imam stated that the accused was not present in the house but came from some other room and again went back to another room saying "kitem zale, kitem zale". P.W.4/Hazarat Bi stated that the accused was also present but did not do anything and this shows that either the deceased or for that matter P.W.1/Imam or P.W.4/Hazarat Bi have not told the truth.

16. The deceased in her dying declaration stated that her husband had not divorced his earlier wife but because of the harassment, she left him. P.W.1/Imam on this aspect stated that the accused was previously married to some girl and both had given Talak and not only that he had proof of Talak having been given but had not brought it to the Court. It is, therefore, again obvious that it is either the deceased or P.W.1/Imam who have

not spoken the whole truth. As far as the harassment is concerned, P.W.12, Bibi, the previous wife of the accused stated that she separated from the accused not only because the accused started assaulting her but also because the mother, the sisters, the brothers and the brother-in-law of the accused started assaulting her. Again, the deceased in her dying declaration stated that in the hospital she had told the nurse that she was burnt by her husband. The evidence of P.W.17/P.I. Sunita Sawant shows that she had recorded two statements of two nurses by name Maria D'Souza and Marcelina Dias but they did not state amything incriminating against the accused. The prosecution examined Marcelina Dias as P.W.13 but she did not support the said statement of the deceased. Further, the deceased stated immediately after the accused married her he started disliking her stating that she was not beautiful and that she was not good as the earlier wife and even on the previous night, he told her the same thing. The best person who might have corroborated this version of the deceased would have been none other than the mother of the deceased but the prosecution chose not to examine her. The only evidence produced by the prosecution on that aspect is that of P.W.2/Basha Sab who stated that the deceased came to his residence on 6-3-2001 for Id and

told them that the accused was harassing her everyday by saying that her behaviour was not good and that of his previous wife was good. P.W.15/Shri Paes has stated that P.W.2/Basha Sab had not made such a statement to him and, therefore, the said statement of P.W.2/Basha Sab has got to be considered as a clear improvement. Neither P.W.1/Imam nor P.W.4/Hazarat Bi supported the deceased on that aspect and as rightly observed by the learned Additional Sessions Judge, the period during which the accused and the deceased stayed together as husband and wife was so short that the case of harassment did not appear to be a serious one (probable) and that apart, mere disliking the behaviour of the deceased would not have made the accused to take the extreme step of burning her, within 18 days of marriage.

17. The written dying declaration of the deceased-Exh.18 colly was in conflict with the evidence of oral dying declaration given by the close relatives of the deceased as well as the close neighbours of the accused and, therefore, no implicit reliance could have been placed on such a written dying declaration.

18. In our view, therefore, the learned Additional Sessions

Judge was certainly justified in giving benefit of doubt to the accused and acquitting him under Section 302 I.P.C. We find there is no merit in this appeal and the same is hereby dismissed.

A. P. LAVANDE, J.

N. A. BRITTO, J.

RD.